# Chan Kwai Chun v Lembaga Kelayakan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-06 OF 2002
ABDUL HAMID MOHAMAD, MOHD SAARI AND MOHD NOOR AHMAD JJCA
30 MAY 2002

***Legal Profession*** *— Admission — Examination — Result of examinations nullified after investigation of leakage of question papers — Whether respondent obligated to adduce first hand evidence to show it had considered all relevant facts and had not acted in a cavalier manner*

The appellant sat in the July 2001 Certificate in Legal Practice Examination ('the said examination'). The respondent is a Qualifying Board established under s 4 of the Legal Profession Act 1976 ('the Act') with function to provide course of instruction and to conduct examinations. On 13 September 2001, the respondent announced the said examination result followed by issuing of Certificate in Legal Practice, which showed that the appellant had a clear pass. The result of the said examination was tabled and approved by the respondent. However, complaint was received about the alleged leakage of question papers relating to the said examination and this prompted the respondent to investigate. On the outcome of the investigation, the respondent was satisfied that the said examination and October 2001 examination had been compromised. The respondent then nullified the result of both examinations. The appellant appealed against the decision of the High Court who dismissed her application for inter alia, the relief in the form of a declaration that the respondent's decision in unilaterally revoking the plaintiff's results in the said examination was in violation of the established rules of natural justice and fair play.

**Held**, dismissing the appeal:

(1) In construing s 26(1) of the Act, it should be read together with s 26(7), thus the application of declaratory relief made by the appellant could not appropriately be made under s 26 of the Act. The operative words of s 26(7) of the Act are 'any order under this Act' (see pp 554H–555A).

(2) The court's function was only to review the decision of the respondent pursuant to s 26 of the Act and not to act as an appellate body and rehear the case. The court as a judicial authority must look at all the facts and evidence that was before the Board. Thus, the respondent was not obligated to adduce first hand evidence but merely to show that it had considered all relevant facts and disregarded irrelevant facts (see p 555B–C, G–H).

(3) The decision based on the examination results as pronounced on 13 September 2001, which was void, was not a decision. Thus,

A the doctrine of estoppel, had no application to the facts of the present case as the decision, being void, had never existed (see p 556B–D).

(4) The appellant was given a right to appeal and the respondent considered her appeal. Although the respondent did not hear the candidates individually, the fact that the respondent went through every paper and convened numerous meetings showed that it gave careful consideration and did not act in a cavalier manner (see p 556H).

C **[Bahasa Malaysia summary**

Perayu telah menduduki Peperiksaan Sijil Amalan Guaman pada Julai 2001 ('peperiksaan tersebut'). Responden merupakan sebuah Lembaga Kelayakan yang ditubuhkan di bawah s 4 Akta Profesyen Undang-Undang 1976 ('Akta tersebut') dengan fungsi untuk memberikan kursus arahan dan untuk mengendalikan peperiksan-peperiksaan. Pada 13 September 2001, responden telah mengumumkan keputusan peperiksaan tersebut yang disusuli dengan pengeluaran Sijil Amalan Guaman, yang menunjukkan bahawa perayu lulus dengan sempurna. Keputusan peperiksaan tersebut telah dibentangkan dan diluluskan oleh responden. Walau bagaimanapun, aduan telah diterima mengenai kebocoran kertas-kertas soalan yang didakwa berhubung dengan peperiksaan tersebut dan ini menyebabkan responden menjalankan penyiasatan. Atas hasil penyiasatan tersebut, responden berpuashati bahawa peperiksaan tersebut dan peperiksaan Oktober 2001 telah dikompromikan. Responden kemudiannya membatalkan keputusan kedua-dua peperiksaaan tersebut. Perayu telah merayu terhadap keputusan Mahkamah Tinggi yang telah menolak permohonan beliau untuk, antara lainnya, relif dalam bentuk pengisytiharan bahawa keputusan responden yang secara sepihak membatalkan keputusan-keputusan plaintif di dalam peperiksaan tersebut adalah melanggari kaedah-kaedah tetap keadilan asasi dan sesuatu yang tidak berpatutan.

**Diputuskan**, menolak rayuan tersebut:

(1) Dalam mentafsirkan s 26(1) Akta tersebut, ianya haruslah dibaca bersama dengan s 26(7), oleh itu permohonan relif pengisytiharan yang dibuat oleh perayu tidak boleh dibuat dengan sempurnanya di bawah s 26 Akta tersebut. Perkataan-perkataan operatif s 26(7) Akta tersebut adalah 'sebarang perintah di bawah Akta ini' (lihat ms 554H–555A).

(2) Fungsi mahkamah adalah hanya untuk mengkaji semula keputusan responden selaras dengan s 26 Akta tersebut dan bukan untuk bertindak sebagai sebuah badan rayuan dan mendengar semula kes tersebut. Mahkamah sebagai pihak berkuasa kehakiman mestilah meneliti kesemua fakta-fakta dan keterangan

yang berada di hadapan Lembaga. Oleh itu, responden tidak berkewajipan untuk memberikan keterangan yang sempurna tetapi hanya untuk menunjukkan bahawa ianya telah mempertimbangkan kesemua fakta-fakta relevan dan tidak menghiraukan fakta-fakta yang tidak relevan (lihat ms 555B–C, G–H).

(3) Keputusan berdasarkan keputusan peperiksaan sepertimana yang diumumkan pada 13 September 2001, yang mana adalah batal, bukannya merupakan satu keputusan. Oleh itu doktrin estopel, tidak dipakai kepada fakta-fakta kes semasa sebagai keputusan, kerana ianya batal, tidak pernah wujud (lihat ms 556B–D).

(4) Perayu telah diberikan hak untuk merayu dan responden mempertimbangkan rayuan beliau. Meskipun responden tidak mendengar calon-calon itu secara individu, hakikat bahawa responden telah meneliti setiap satu kertas dan menjalankan banyak mesyuarat menunjukkan bahawa ianya telah memberikan pertimbangan yang teliti dan tidak bertindak dengan cara yang angkuh (lihat ms 556H).]

**Notes**

For cases on admission, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1454–1455.

**Cases referred to**

*Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497 (refd)

*Loganathan a/l PL Suppiah v Lembaga Kelayakan Profession Undang-Undang Malaysia* [1997] 5 MLJ 237 (refd)

*Russel v Duke of Norfolk And Others* [1949] 1 All ER 109 (refd)

**Legislation referred to**

Evidence Act 1950 s 2

Legal Profession Act 1976 ss 4, 5(e), 21(1), (4), 22, 23, 26(1), (7)

**Appeal from:** Originating Summons No R2–17–95 of 2001 (High Court, Kuala Lumpur)

*Karpal Singh* (*Jagdeep Singh Deo* and *Ramkarpal Singh* with him) (*Karpal Singh & Co*) for the appellant.

*Zaki bin Tun Azmi* (*Alvin John* with him) (*Rashid & Lee*) for the respondent.

**Mohd Saari JCA** (delivering the judgment of the court): The appellant appealed against the decision of Ariffin Zakaria J who dismissed her application for the following reliefs:

(a) declaration the defendant's decision on 12 November 2001 in unilaterally revoking the plaintiff's results in the July 2001 Certificate in

A Legal Practice Examination ('the said examination') is in violation of the established rules of natural justice and fair play;

(b) a declaration the decision making process resorted by the defendant in annulling the plaintiff's July, 2001 results in the said examination is fatally flawed thereby meriting the honourable court's interference and indulgence to review and restore the said results;

B (c) a declaration the plaintiff was entitled to a legitimate expectation of being heard before the defendant annulled the July, 2001 results in the said examination;

(d) a declaration the defendant is estopped from annulling July 2001;

(e) a declaration the decision the defendant made on 27 November 2001 annulling the plaintiff's results in the said examination is null and void, of no consequence, inoperative and not on the authority of a valid or legal power;

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(f) a declaration the communication to the plaintiff by the defendant on 27 November 2001 that she had failed the July, 2001 CLP examination is illegal, arbitrary and contrary to the principles of law and ought to be quashed and set aside;

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(g) an order the defendant be directed to declare its decision on 27 November 2001 that the plaintiff had failed the July 2001 CLP examination is unlawful, inoperative and of no consequences;

(h) an order the defendant be directed to declare the July 2001 result in the said examination are lawful and valid;

E (i) costs; and

(j) any further or other relief deemed fit and proper by the honourable court.

Apart from appellant, the said decision was also binding on 14 other plaintiffs who made similar requests to have their original examination results reinstated.

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*Background*

The appellant sat for the said examination. The respondent is a Qualifying Board established under s 4 of the Legal Profession Act 1976 ('the Act') with function to provide course of instruction and to conduct examinations. G The said examination was conducted by the respondent pursuant to the said function.

On 13 September 2001, the respondent announced the said examination results followed by the issuing of the Certificate in Legal Practice ('CLP') (exh CKC-1) dated 13 September 2001 which showed H that the appellant had a clear pass. However, subsequently the respondent nullified the said examination result followed by issuing of another certificate (exh CKC-2) dated 27 November 2001 which showed that the appellant had failed the said examination.

Under normal procedure, the papers for CLP examinations are marked in accordance with the scheme of marks (exh C). Initially, the papers are I examined by an examiner to be followed by re-examination by another examiner. Eventually, the marks are entered into a master list report ('the master list') prepared by the director. After the abovementioned steps

are taken, the director would table the master list for approval by the respondent. A

Thus, in the present case, the master list, which contained the results of the said examinations, was tabled and approved by the respondent. On 10 November 2001 or thereabout complaints were received about the alleged leakage of question papers relating to the said examinations and this prompted the respondent to investigate. On the outcome of the investigation, the respondent was satisfied that the said examinations and October 2001 examinations had been compromised. Then on 12 November 2001, the respondent nullified the results of both examinations. B

In the case of appellant, based on her answer scripts (exh F), she actually failed two papers namely civil procedure and criminal procedure. In the result, she failed the said examination. C

The issues for determination may be crystallized as follows:

(i) preliminary issue as to whether the reliefs prayed for fell within the scope of s 26 of the Act;

(ii) admissibility of two documents, ie the master list and the answer scripts (exhs D and F respectively); D

(iii) scope of judicial review;

(iv) whether the declaration of the original examination results was ultra vires the Act;

(v) whether the doctrine of estoppel applied; E

(vi) whether the appellant had a legitimate expectation to a right of hearing; and

(vii) on the conduct of the director.

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*First issue*

It is trite that parties are bound by the pleadings. In the intitulement as pleaded in the originating summons filed by the appellant, she relied on s 26 of the Act. For the respondents, it is submitted none of the reliefs sought by the appellant fell within the scope of s 26 of the Act. Under the aforesaid section, the court has jurisdiction to grant four types of remedies as specified under ss 21(1), (4), 22 and 23 of the Act, which sections do not apply to persons other than articled clerks. In support, the learned counsel for the respondent relied on the case of *Loganathan a/l PL Suppiah v Lembaga Kelayakan Profession Undang-Undang Malaysia* [1997] 5 MLJ 237. Tan Sri Zaki urged this court to give a purposive approach in construing s 26 of the Act. In response, Mr Karpal Singh, counsel for the appellant, submitted that under s 26 of the Act, there was ample power for the court to grant reliefs sought if the court was satisfied that the respondent ('the Board') was not justified in nullifying the examination result. In the court below, the learned trial judge said that in construing s 26(1) of the Act, it should be read together with s 26(7) of the Act, and he concluded that on the preliminary issue, the application could not appropriately be made under s 26 of the Act. We agree. The operative words of s 26(7) of the Act G H I

A are 'any order under this Act'. On this issue, our finding is in the negative. On this ground alone, the appellant's case must fail.

*Second and third issues*

It is proposed to deal with the two issues together. For the appellant, B Mr Karpal Singh submitted that both documents (exhs D and F) were inadmissible on the ground that the makers were not called. Thus, bereft of the two documents, the respondent's case cannot stand. Short of the two documents, there is nothing to support the respondent's case.

In response, the respondent submitted that the court's function was C only to review the decision of the respondent pursuant to s 26 of the Act and not to act as an appellate body and rehear the case. In support, the respondent cited a passage in *Administrative Law of Malaysia and Singapore* (1980) by MP Jain at p 377 which states:

> As regards review of non-jurisdictional facts, courts exercise a very limited jurisdiction. The court does not act as an appellate body from the tribunal in D question but acts only in a supervisory capacity. The courts have thus laid down the norm that they would not interfere with the findings of fact by a tribunal unless the same are completely unsupported by evidence. This is known as the 'no-evidence' rule. A finding having no evidence to support it is regarded as an error of law and is quashed. If, however, there is some evidence to support a finding of fact, courts do not interfere with the same. The courts E do not regard it as their function to interfere with findings of fact by a tribunal merely because of insufficiency or inadequacy of evidence. The courts have evolved such a restrictive rule to review facts as they want to give the tribunals enough leeway to decide cases entrusted to them for disposal. Too much interference with them may take away the advantages and rationale of tribunal adjudication. But, at the same time, these bodies cannot be left completely F uncontrolled lest they should act in arbitrary manner. Therefore, the 'no-evidence' rule has been evolved to impose a limited judicial review on facts decided by them.
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> If there is some evidence to support a finding of fact, it is not then for the courts to go into the sufficiency of adequacy of evidence. It is not the court's function to review, reassess, reappreciate, reappraise evidence, or draw its own G inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence. The court has to take the evidence as it stands and not go into questions of reliability of evidence in a petition for certiorari.

Further, it was submitted that the court as a judicial authority must look at all the facts and evidence that were before the Board. Thus, the respondent H was not obligated to adduce first hand evidence but merely to show that it had considered all relevant facts and disregarded irrelevant facts. With that submission, we agree. Further, in our view, on the question of whether the two documents (exhs D and F) which the respondent had acted upon were admissible or not was a non-issue. Looking from another perspective, bearing in mind that the present case proceeded on the basis of affidavit I evidence, the hearsay rule does not apply by virtue of s 2 of the Evidence Act 1950. Moreover, the facts as contained in the impugned documents (exhs D and F) are not being contradicted by other evidence.

*Fourth and fifth issues*

Facts disclosed in para 17 of Wahab's affidavit was that based on the written scripts of the appellant, marks given by examiner was $29^{1}/_{2}$ for civil procedure and 33 marks for criminal procedure. Whereas in the master list prepared by En Khalid, marks written therein were 40 marks for each subject which is the minimum passing marks. If the respondent were to uphold the decision based on examination results as pronounced on 13 September 2001, such an act is ultra vires the Act being contrary to s 5(e) of the Act.

The decision based on the examination results as pronounced on 13 September 2001 which is a void is not a decision. In this regard, it is pertinent to refer to the article by Michael Akehurst in *Public Law* (1982) at p 619 which states:

> A void decision is, strictly speaking, not a decision at all and therefore does not need to be revoked. If a public authority has taken a decision which is void, it is entitled to ignore that decision and to consider the matter again as if original decision had never existed. In this context, a decision is regarded as void if it is ultra vires.

On doctrine of estoppel, it has no application to the facts of the present case as the original decision, being void, had never existed.

*Sixth issue*

Generally, procedure at the inquiry should not be conducted in the same manner as in criminal trial in court of law. What is required is that the procedure must be fair. What is fair will depend on the facts and circumstances of each case, as stated by *Tucker LJ in Russel v Duke of Norfolk And Others* (1949) 1 All ER 109 at p 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth.

Facts disclosed in this case is that many students besides the appellant were informed that they had passed and accordingly started their pupilage. Thus the respondent had a duty to act with great promptitude. The respondent held many meetings to ensure that the integrity of the profession was maintained. On the facts, the number of pupils were nearly 300, which made it impracticable to conduct individual hearing with each of the candidates involved.

In any event, the appellant was given a right to appeal which she did and the respondent considered her appeal. Although the respondent did not hear the candidates individually the fact that the respondent went through every paper and convened numerous meetings showed that it gave careful consideration and did not act in a cavalier manner. The respondent also consisted of responsible persons including the attorney general and senior judges. The respondent also heard the views of the Bar Council.

A On this issue, the learned judge in the court below had this to say:

> Judging from the content of the plaintiff's letter I don't think any hearing would have made any difference. The plaintiff himself stated there was no impropriety on his part, and the defendant never for a moment alleged that there was any impropriety or blameworthiness on the part of the plaintiff for this unfortunate episode. On that ground alone it could be argued that there is no necessity in the circumstances of this case for the right of hearing to be given to the plaintiff or any other candidates before the decision to revoke the July examination results was taken by the defendant.

Further, the learned judge said:

> For the above reasons, I agree with the submission of Tan Sri Zaki that in the circumstances of this case it is not practicable for the right of hearing to be given to the plaintiff or any other candidates and any hearing would not have made any difference. Thus based on the facts of this case, I think the plaintiff has not in any way been prejudiced by the failure on the part of the defendant to afford him the right of hearing, hence such a failure could not vitiate the decision to revoke the July examination results.

With the above finding, we agree.

*Seventh issue*

For the appellant, it was submitted that the respondent must take responsibility for the wrongful act of the director. In support, Mr Karpal Singh cited the case of *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497. In that case, it was an action for damages for alleged tort. Unlike that case, here the case is for judicial review. In our view, the principle as enunciated in that case has no application to the present case.

*Conclusion*

By this originating summons, in effect the appellant is asking the court to pass a candidate who had in fact failed in the said examinations. A declaration is a discretionary remedy. Based on the grounds as set out above, we do not think that it is in the interest of the profession or the public for the court to exercise the discretionary power in her favour. The learned judge in the court below was right in dismissing the application and we so affirm. The appeal is dismissed with costs. Deposit is for the account of costs to be taxed.

My learned brothers, Abdul Hamid Mohamad JCA and Mohd Noor Ahmad JCA, have read this judgment in draft and have expressed their agreement.

*Appeal dismissed.*

Reported by Peter Ling